



November 18, 2013

VIA ELECTRONIC MAIL

FREEDOM OF INFORMATION ACT REQUEST

Re: Freedom of Information Act Request for Records Related to the Environmental Protection Agency's Proposed Rule Titled Nanoscale Materials; Reporting Under TSCA Section 8(a) (RIN: 2070-AJ54).

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 as amended by the Center for Biological Diversity (Center), a nonprofit organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has worked for many years to protect imperiled plants and wildlife, open space, air and water quality, and overall quality of life. The Center's Toxics and Endangered Species Campaign employs a broad range of tools to reduce the harmful impacts of toxic contamination from pesticides, endocrine disruptors, heavy metals, and other toxic substances that enter the environment. Through strategic litigation, creative media, policy advocacy, scientific reports, coalition building and outreach to our members, the Center's campaign targets some of the most harmful toxins in our environment. Consistent with this mission and consistent with the Freedom of Information Act (FOIA), 5 U.S.C. § 552, I respectfully request the following information on behalf of the Center:

- **All documents and information relating to the proposed regulatory proposal referred to as “Nanoscale Materials; Reporting Under TSCA Section 8(a)” rulemaking (RIN: 2070-AJ54).**
- **All documents and information submitted by the Environmental Protection Agency (EPA) to the Office of Information and Regulatory Affairs (OIRA) concerning the “Nanoscale Materials; Reporting Under TSCA Section 8(a)” rulemaking (RIN: 2070-AJ54), and the accompanying detailed descriptions of the need for the regulatory action and an explanation of how the regulatory action will meet that need.¹**
- **All documents and information exchanged between OIRA and EPA pursuant to Executive Order 12866 §§6(a)(3)(B)-(C), concerning the “Nanoscale Materials; Reporting Under TSCA Section 8(a)” rulemaking (RIN: 2070-AJ54), including, but not limited to:**
 - a. Any and all assessments of the potential costs and benefits of the regulatory action.²**

¹ See Executive Order 12866 §6(a)(3)(E)(i); §§6(a)(3)(B) – (C); and §6(b)(4)(D).

² See Executive Order 12866 §6(a)(3)(E)(i)

“All documents” includes, but is not limited to, all memoranda, maps, studies, reports, data, correspondence, comments, conversation records, files, electronic mail records, phone notes, or other documents.

Pursuant to FOIA and Executive Order 12866, EPA and OIRA are under a strong obligation to release all of these documents. This obligation is further strengthened by the January 21, 2009, presidential memorandum on FOIA establishing a presumption in favor of disclosure.³

This request applies to EPA files in any form, including comments received formally and informally, via U.S. mail, fax, email, and both during and after any official public comment period. This request also covers any non-identical duplicates of records that by reason of notation, attachment or other alteration or supplement includes any information that may not be in the original record. This request does not exclude additional records that, though not specifically requested, have a reasonable relationship to the subject matter of this request. We request these files in electronic format, if possible.

If you should seek to prevent disclosure of any requested records, we request you: (i) identify each such document with particularity (including date, author, recipient and parties copied), (ii) explain in full the basis for seeking non-disclosure, and (iii) provide the Center with any severable portions of the records for which you do not claim a specific exemption. The Center requests you waive any applicable fees, as disclosure clearly serves the public interest.

I. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.

This requested information will significantly contribute to public understanding of the issues involved, as defined by the Environmental Protection Agency.

A. The subject of the request concerns “the operations and activities of the government.”

The subject matter of this request relates to potential regulation of nanoscale materials in the environment by the Environmental Protection Agency. Nanoscale materials released into the environment may undergo transformation by environmental conditions such as temperature and salinity, biological conditions such as habitat, and the presence of co-contaminants. In turn, the transformed nanoscale materials may modify atmospheric, soil, or water chemistry. Biological or environmental systems may be exposed to these dispersed engineered nanoscale materials and respond through systems and pathways designed to buffer exposures to substances that could perturb human health or adversely impact the environment. It is clear that protection of human health and environmental impacts, are specific and identifiable activities of the government, in this case the Environmental Protection Agency and Office of Management and Budget. See Judicial Watch, 326 F.3d at 1313 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted).

³ Memorandum from President Barack Obama for the Heads of Executive Departments and Agencies (Jan. 21, 2009), available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

B. The disclosure is “likely to contribute” to an understanding of government operations or activities (the informative value of the information to be disclosed).

The information requested will help provide the Center with crucial insight into the policies and decision-making processes relating to regulation of nanoscale materials, which pose unique and potentially unquantifiable risks to the environment and endangered species. For three years, the Office of Information and Regulatory Affairs has been reviewing a proposed regulation under the Toxic Substances Control Act (TSCA), far in excess of the 90 day review period sanctioned by Executive Order 12866. FOIA request will shed critical light on the obstacles to issuing regulations under TSCA to address nanoscale materials.

The release of these documents is not only “likely to contribute,” but is in fact certain to contribute to better public understanding of EPA’s obligations under the law to protect human health and the environment under TSCA as well as the relationship between EPA and OIRA regarding the review of regulatory proposals designed to protect human health and the environment. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted. See Judicial Watch, 326 F.3d at 1314 (“[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.”).

In McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286, the court made clear that “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....” In this instance, all the requested documents potentially provide new information about OIRA’s actions, especially regarding the review process for regulations designed to protect human health and the environment, and whether this process is being thwarted by improper political or economic interference. See Western Watersheds Project v. Brown, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); see also Community Legal Services v. HUD, 405 F.Supp.2d 553 (D. Pa. 2005) (“[T]he CLS request would likely shed light on information that is new to the interested public.”). Finally, this request will also shed light on whether the OIRA, the OMB, and/or the EPA are appropriately implementing environmental laws and regulations.

C. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

Public understanding of the process by which EPA develops regulatory proposals under TSCA will be significantly increased as a result of disclosure because the requested information will help reveal more about the decisions underlying the EPA’s environmental risk evaluation process for a suite of environmental threats in the future. In other words, once the public is more aware of actions by EPA, the public will (1) have a better understanding of the roadblocks in implementing regulatory proposals designed to protect human health, the environment, and endangered species; (2) have a better understanding of the internal decision-making processes regarding the review of regulatory proposals from the EPA and other executive agencies at the White House; and (3) be

able to better gauge whether EPA and/or OIRA actions/decisions have been appropriate and consistent under applicable law and executive orders.

The documents are also certain to shed light on the EPA's compliance with environmental laws. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. The Center intends to fulfill its well established function of public oversight of agency action. The Center is not requesting these documents merely for their intrinsic informational value. It is irrelevant whether any portion of the Center's request may currently be in the public domain, because the Center requests considerably more than any piece of information that may currently be available to other individuals. Judicial Watch, 326 F.3d at 1315.

In addition, the Center plans to take the information it learns from the disclosed documents and educate the public about the EPA's regulation of potentially toxic materials under TSCA as well as the regulatory review process at OIRA with respect to proposed regulatory actions that focus on protecting human health and the environment. The Center will educate the public about whether the EPA and/or OIRA/OMB actions are appropriate in light of the known information. See Western Watersheds Project, 318 F.Supp.2d at 1040 ("In the letter denying the appeal, the FOIA Officer stated that WWP had failed to demonstrate....how the information would contribute to the understanding of the general public of the operations or activities of the government. The Court, however...finds that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and...how management strategies employed by the BLM may adversely affect the environment.").

There can be no dispute that disclosure of the requested documents may provide information that will significantly enhance the public's understanding of the OMB's and OIRA's legal obligations and EPA's regulation of environmental threats in general. Even if the documents fail to reveal that certain actions need to be taken does not mean the documents do not serve the public interest. See Judicial Watch, 326 F.3d at 1314.

II. Obtaining the information is of no commercial interest to the Center.

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. The Center, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

III. The Center has a recognized ability to disseminate this information broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee-waivers, agencies have recognized that (1) the Center's requested information contributes significantly to the public understanding of the operations or activities of the government, (2) the Center's requested information enhances the public's

understanding to a greater degree than currently exists, (3) the Center possesses the expertise to explain the requested information to the public (e.g. the Center has several staff biologists and staff attorneys), (4) the Center possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that the Center is an established expert in the field of imperiled species, biodiversity, and impacts on protected species.

Public oversight and enhanced understanding of Service duties is absolutely necessary. The Center members' track record of active participation in oversight of governmental agency activities and its consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a *reasonably broad audience of persons interested in the subject*. Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994)(emphasis added). The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." Judicial Watch, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. Id.

The documents requested in this FOIA request will be used to evaluate the actions of the OMB and OIRA with respect to EPA's regulation of nanoscale materials, and the harm that is likely resulting due to delays in releasing the regulatory proposal on time back to the EPA so that the proposed rule can be presented to the public, as well as what actions the EPA are or are not taking in light of delays in regulatory review process. Concurrent with any action which the Center may take after obtaining the requested documents, the Center will publicize the underlying actions of the Office of Management and Budget, the Environmental Protection Agency and/or other federal agencies that have prompted these actions. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of EPA responsibilities. The Center has enforced or publicized agency compliance with the provisions of various environmental laws many times through information gained from FOIA requests like this one.

The Center intends to use the documents requested in this request in a similar manner. The Center's work appears in well over 2,000 news stories in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. Last year, more than 1.5 million people visited the Center's extensive website, viewing a total of more than 6.5 million pages. The Center also sends out more than 200 email newsletters and action alerts per year to more than 625,000 members and supporters. Three times a year, the Center sends printed newsletters to more than 40,000 members. The Center also regularly tweets to more than 18,000 followers on Twitter. The Center intends to use any or all of these far-reaching outlets to share with the public information obtained as a result of this request.

Information concerning the EPA's nanoscale materials regulatory proposal and the improperly long OIRA review of this regulatory proposal, will be disseminated through all of these means. See Forest Guardians v. DOI, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested

information is likely to contribute to the public's understanding of the BLM's operations and activities.”).

I hope that this letter has demonstrated to your satisfaction that the Center qualifies for a full fee-waiver, and that you will immediately begin to search and copy the requested material. If you have any questions regarding this request, you may contact me at (202) 817-8121 or bhartl@biologicaldiversity.org. The records and any related correspondence should be sent to my attention at the address below.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Brett Hartl", with a long, sweeping horizontal line extending to the right.

Brett Hartl
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